SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 30 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 537

TRANSAMERICAN FREIGHT LINES, INC.
and RALPH CARBONE,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
on complaint of Officer JOHN GILLIES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK ~~AND THE CRIMINAL COURT OF THE CITY OF NEW YORK~~

ABRAHAM BREITBART,
Counsel for Petitioners,
Office & P. O. Address,
No. 1 Liberty Street,
New York, N. Y. 10005

INDEX

	PAGE
THE OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES AND REGULATIONS INVOLVED	5
STATEMENT	7
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	17
APPENDIX A:	
Judgments of the Criminal Court of the City of New York	1a
Opinion of the Criminal Court of the City of New York	3a
Order and Judgment of the Supreme Court, Appellate Term, First Department	9a
Per Curiam Opinion of the Supreme Court, Appellate Term, First Department	11a
Order and Judgment of The Court of Appeals of the State of New York	12a
Opinion of the Court of Appeals of the State of New York	15a

Cases Cited

Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520	12
Boyce Motor Lines v. United States, 342 U. S. 337	14
California v. Zook, 336 U. S. 725	9

PAGE

Castle v. Hayes Freight Lines, 348 U. S. 61 11

Charleston & W.C.R. Co. v. Varnville Furniture Co., 237 U. S. 597 11

Commonwealth of Pennsylvania v. Nelson, 350 U. S. 497 10

Northern Pacific Railway Co. v. The State of Washington, 222 U. S. 370 13

St. Johnsbury Trucking Co., Inc. v. United States, 220 F. 2d 393 13

United States v. A & P Trucking Corp., 113 F. Supp. 549 15

United States v. Chicago Express, Inc., 235 F. 2d 785 14

Statutes Cited

New York Vehicle and Traffic Law, Section 380....3, 5fn, 7, 9, 12, 15

Transportation of Explosives Act (Explosives and Other Dangerous Articles), 18 U.S.C., Section 834 ..... 3, 5, 6fn

Regulation Cited

Code of Federal Regulations, Title 49, Sections 73.115 and 77.823 ..... 5, 7fn

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

TRANSAMERICAN FREIGHT LINES, INC. and RALPH CARBONE,
Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,
on complaint of Officer John Gillies,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK ~~AND THE CRIMINAL COURT OF THE CITY OF NEW YORK~~

The petitioners, Transamerican Freight Lines, Inc. and Ralph Carbone, pray that a Writ of Certiorari issue to review an order and judgment of the Court of Appeals of the State of New York, dated June 4, 1969, and entered in the above case. Said order and judgment affirmed an order and judgment of the Supreme Court of the State of New York, Appellate Term, First Department, dated June 19, 1968, and entered June 20, 1968, affirming judgments of the Criminal Court of the City of

New York, County of New York, dated October 20, 1967, convicting the petitioners of misdemeanors, and from which judgment of the Appellate Term, leave to appeal to the Court of Appeals was granted by an Associate Judge of the Court of Appeals of the State of New York.

The Opinions Below

The opinion of the Criminal Court of the City of New York, County of New York, is reported at 54 Misc. 2d 762, 283 N. Y. S. 2d 468 (1967), and said opinion and judgments are printed in Appendix "A" hereto, pages 1a and 3, *infra*. The *per curiam* affirmance of the Supreme Court of the State of New York, Appellate Term, First Department, is reported at 57 Misc. 2d 1089, 294 N. Y. S. 2d 156 (1968), and the order and judgment and *per curiam* opinion are printed in Appendix "A", pages 9a and 11a, *infra*. The opinion of the Court of Appeals of the State of New York is reported at 24 N. Y. 2d 727 (1969), and the order and judgment and said opinion are printed in Appendix "A", pages 12a and 15a, *infra*.

Jurisdiction

The order and judgment of the Court of Appeals of the State of New York was made and entered on June 4, 1969 (Appendix "A", page 12a, *infra*). The order and judgment of the Supreme Court of the State of New York, Appellate Term, First Department, was made and entered on the 20th day of June, 1968 (Appendix "A", page 9a, *infra*). The judgments of the Criminal Court of the City of New York were made and entered on October 20, 1967 (Appendix "A", page 1a, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

Questions Presented

The petitioners were found guilty in the New York City Criminal Court of the interstate transportation of ethylene oxide, a substance claimed to be a flammable liquid, without placarding their vehicle in alleged violation of Section 380, Subdivision 3, of the Vehicle and Traffic Law of the State of New York. The statute under which the petitioners were convicted eliminated any proof of criminal intent or scienter as a necessary element for conviction even if the defendants were to be charged with the commission of a felony. The Congress of the United States, pursuant to the "Commerce Clause" of the Constitution (Article I, Section 8(3)) had previously manifested its intention to control the interstate transportation by motor carriers of flammable liquids and other dangerous articles by the passage of the Transportation of Explosives Act (Explosives and Other Dangerous Articles, 18 U. S. C., Sections 831-835). Subdivision (f) of Section 834 of this statute imposes penalties on *"whoever knowingly"* violates the regulations promulgated thereunder by the Interstate Commerce Commission, thereby requiring proof of scienter or criminal intent before a conviction under the federal statute can be had. Thus, in the important aspect of proof of criminal intent the state statute deviates from federal law and its validity is drawn in question on the ground of its being repugnant to the laws of the United States. At the trial the prosecution did not present any evidence that the defendants knowingly violated the statute.

The New York State statute provides that the existence of a flammable liquid is proven by the performance of a test which results in flammable vapors being given off at or below a certain temperature. In this respect the New York statute parallels the federal law and regulations.

However, the trial court found that the guilt of the petitioners had been proved beyond a reasonable doubt despite the failure of the prosecution to present any evidence that the statutory test for determining the flammability of the substance being transported in interstate commerce had been made. By its conviction of the defendants without proof that the commodity was present and had been tested and found to be flammable, the trial court deprived these petitioners of their rights without due process of law and denied them equal protection of the law. The Appellate Term of the New York Supreme Court and the Court of Appeals affirmed. The questions presented are:

1. May the State of New York constitutionally enforce a penal statute passed by its legislature which purports to regulate interstate commerce and which is in direct conflict with a statute of the Congress of the United States and the regulations promulgated thereunder by the Interstate Commerce Commission?

2. Where the Congress has acted to pre-empt a field of interstate transportation by passage of a statute which requires that for a conviction the defendants must knowingly violate its provisions, may the State of New York constitutionally enforce its own statute applicable to the same field of interstate transportation which eliminates proof of scienter and criminal intent as a requisite for conviction?

3. Where both federal and state regulations pertaining to a shipment moving in interstate transportation call for proof of the testing of the commodity to determine its flammability, may the state court dispense with these requirements in a criminal prosecution?

4. Was the failure of the trial court to require (1) proof of the existence of the commodity being transported, and (2) proof by statutory test of its flammability, a denial of due process and equal protection of the law?

Statutes and Regulations Involved

The pertinent portions of the statutes and regulations involved in the instant case are Section 380 of the Vehicle and Traffic law of the State of New York, 18 United States Code Section 834, and Code of Federal Regulations, Title 49, Section 73.115 and 77.823.*

---

* New York Vehicle and Traffic Law, Section 380:

1. * * *

"Dangerous article," as used in this section, shall mean any flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous substances and radio-active materials as hereinafter defined when transported as cargo by motor vehicle on a highway. This section, however, shall not apply to explosives as defined in article sixteen of the labor law, or to flammable liquids transported in tank trucks, tank trailers or tank semi-trailers in accordance with section three hundred seventy-eight of the vehicle and traffic law.

"Flammable liquids," as used in this section, shall mean any liquid which gives off flammable vapors (as determined by flash point from Taglibue's open cup tester, as used for test of burning oils) at or below a temperature of eighty degrees Fahrenheit.

3. It shall be unlawful to transport by motor vehicle over the highways within this state any dangerous article without conspicuously marking or placarding any motor vehicle engaged in such transportation on each side and on the rear thereof with the word "dangerous" or the com-

(*Footnote continued on following page*)

(Continued from preceding page)

mon or generic name of the substance transported or its principal hazard; provided, that the commissioner of motor vehicles may, by regulation issued after a public hearing, prescribe with respect to any specific dangerous article the minimum quantities below which no placard shall be required.

5. A first violation of any of the provisions of this section shall be a misdemeanor, punishable by a fine not exceeding five hundred dollars, or by imprisonment not exceeding sixty days, or both such fine and imprisonment; a second violation shall be a misdemeanor punishable by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment not exceeding six months, or both such fine and imprisonment; and any subsequent violation shall be a felony. L. 1959, c. 775, eff. Oct. 1, 1960.

United States Code, Title 18:

Section 834 Regulations by Interstate Commerce Commission

(a) The Interstate Commerce Commission shall formulate regulations for the safe transportation within the United States of explosives and other dangerous articles, including radioactive materials, etiologic agents, flammable liquids, flammable solids, oxiding materials, corrosive liquids, compressed gases and poisonous substances, which shall be binding upon all carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any carrier engaged in interstate or foreign commerce by land or water.

* * *

(f) Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(Footnote continued on following page)

Statement

Petitioner, Transamerican Freight Lines, Inc., is duly licensed by the Interstate Commerce Commission as an interstate motor carrier and is engaged in transporting cargo across the several states of the United States. The petitioner, Ralph Carbone, is employed by Transamerican Freight Lines as a driver. On September 8, 1966, he was given a summons by a Port Authority police officer at the New York Plaza of the Holland Tunnel and charged with transporting ethylene oxide contained in sealed drums without having placarded his vehicle as required by Section 380 of the New York Vehicle and Traffic Law. Subsequently, a summons for the same misdemeanor was served upon Transamerican Freight Lines, Inc.

At the trial the People failed to offer any direct proof of the existence of a flammable liquid in the sealed drums which were being transported. It was conceded by the

---

(*Footnote continued from preceding page*)

Code of Federal Regulations, Title 49:

Section 73.115 Flammable liquids, definitions.

(a) A flammable liquid for the purpose of Parts 71-79 of this chapter is any liquid which gives off flammable vapors (as determined by flash point from Tagliabue's open cut tester, 1 as used for test of burning oils) at or below a temperature of 80° F.

1 American Society for Testing and Materials Standard Method of Test for Flash Point of Volatile Flammable Materials by Tag Open-cup Apparatus (D 1310-63).

Section 77.823 Marking on motor vehicles and trailers.

(a) Every motor vehicle transporting * * * 2500 pounds gross weight or more * * * flammable liquids * * * shall be marked or placarded on each side and rear * * *.

prosecution that it had no physical evidence of the substance involved (RA, pages 22, 30). The Chief of Chemical Testing for the Port Authority admitted that no samples of the contents of the drums were taken and no tests were made (RA, pages 22, 26). He testified that he had made some 250 tests of this kind for the Port Authority, but he failed to explain why the testing procedure had been dispensed with in this case (RA, page 24).

The prosecution was permitted to offer as proof, over objection, a shipping document, a facsimile of a label, a tag, and some photographs, as wholly circumstantial evidence of the existence of the alleged dangerous properties of the commodity being transported (RA, pages 13-18). Nowhere in the testimony of the witnesses for the People is there any indication that the liquid being transported was physically seen or that its properties were observed.

Likewise, a reading of the entire transcript of the record of the comparatively brief trial indicates that no effort was made by the People to prove criminal intent on the part of the defendants or that they "knowingly violated" the statute under which they were being prosecuted. It was admitted that the requirement of scienter was not present in the New York statute (see Appendix "A", page 17a, *infra*), and the trial court held that such proof was not necessary for a conviction (Appendix "A", page 5a, *infra*). The court said further that no conflict existed between the New York statute and similar federal law and regulations in spite of the fact that the federal statute, enacted by Congress in a field pre-empted by it, specifically required proof for a conviction that its provisions were "knowingly violated." The court also concluded that the guilt of the defendants had been proved beyond a reasonable doubt despite the failure to

present evidence of the existence of a flammable liquid, or that the statutory test for determining same had been performed.

The Court of Appeals and the Appellate Term of the Supreme Court both affirmed the convictions of the petitioners. The Court of Appeals said that the state was not ousted of jurisdiction merely because the Congress had also acted, and that "in this kind of a situation 'knowingly' plays no practical role" (Appendix "A", page 17a, *infra*). The cases cited to support its conclusion that the state and federal regulatory statutes were harmonious, are all clearly distinguishable from the instant case. Particularly in *California* v. *Zook*, 336 U. S. 725, this Court found that there was no conflict in the provisions of the federal and of the California statutes, and it noted at page 735 that "the state statute makes federal law its own in this particular." If Section 380 of the Vehicle and Traffic Law has indeed made the federal law that of New York, then the defendants should have been acquitted for failure of proof that the statute was knowingly violated. If Section 380 has departed from federal law by not requiring scienter, then there is clear conflict with a statute passed by the Congress in a field preempted by it.

Reasons for Granting the Writ

The decision below should be reviewed because it is concerned with the important issue of federal-state relationship in a field where the constitutional grant of power to Congress is exclusive, particularly in regard to interstate commerce. The absence of any requirement in a state court prosecution that the statute has been "knowingly" violated sets up an irreconcilable conflict between the state law and the federal statute and regulations.

In this regard, *Commonwealth of Pennsylvania* v. *Nelson,* 350 U. S. 497, holds that where Congress has occupied a field to the exclusion of state legislation, any state act which conflicts with the operation of the Congressional intent is superseded by the federal statute. This Court referred to "a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Referring to the importance of the federal-state relationship, the Court noted that

> "The federal statutes 'touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject.'"

The decision of the Court of Appeals of the State of New York offends against the constitutional guaranty of due process of law because it subjects the petitioners to criminal prosecution under a state statute containing provisions inconsistent with federal regulation. Great doubt is cast upon the applicability of the state law to the act of interstate transportation here involved, and the actions of the courts below are violative of the federal statute and of the constitutional rights of the petitioners. A state court has decided a federal question of substance in a manner not in accord with applicable decisions of this Court. The serious questions of public policy involved, the importance of this case to the transportation industry, and the effect of the decision below, if not reversed, make this case a particularly appropriate one for the exercise of the court's discretionary jurisdiction.

The question of the validity of the state statute here involved under the "Commerce Clause" of the United States Constitution is of far-reaching importance. Congress has the power to regulate the movement of goods

and materials across state lines. It has declared by law the policy which it desires enforced and it has conferred on the Interstate Commerce Commission the power to make rules and regulations to carry out its policy. Since Congress has occupied this field, the enforcement of any state law in conflict with federal statute as to procedures and penalties might well frustrate the accomplishment of federal objectives. The state statute must be deemed superseded by federal law in the absence of a contrary indication of intent.

In *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, this Court reversed a judgment imposing a penalty against an interstate carrier for failure to pay a claim promptly, and held that the state "legislation is not saved by calling it an exercise of the police power," or "that the act is in aid of interstate commerce". The Court said that:

> "The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived. * * * When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

In *Castle* v. *Hayes Freight Lines*, 348 U. S. 61, state officials were restrained from suspending the operating rights of interstate motor carriers because of their violation of state highway regulations. This court found that under the Federal Motor Carrier Act, "no power at all was left in states to determine what carriers could or could not operate in interstate commerce." The New York Court of Appeals in its opinion (Appendix "A", page 17a, *infra*) attempted to distinguished between *Castle* v. *Hayes Freight Lines* and the case under review here. It said that the suspension of interstate operating rights

was a real intrusion on federally regulated interstate commerce and constituted the disruption of a federally authorized activity, as opposed to a theoretical intrusion by a state. What the Court of Appeals failed to note was that convictions under Section 380 of the Vehicle and Traffic Law are far more real than theoretical dangers to interstate motor carriers since they could result in a curtailment and suspension of their operating rights by the Interstate Commerce Commission.

In the appeal of the petitioners to the Court of Appeals of the State of New York, there was presented and necessarily passed upon a question under the Constitution of the United States. The opinion of the Court of Appeals deals with the possible conflict with federal legislation which invalidates a state law, and it holds that no such conflict exists. The existence of a federal and constitutional question sought to be reviewed here was thus raised and passed upon (Appendix "A", pages 17a, 18a).

In *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, this Court enunciated the principle that where the federal government has clearly manifested its intention to deal fully with a field of interstate transportation, any action by the state would be restricted to acts not inconsistent with or contrary to federal regulation. The Court said at page 529:

> "Local regulations which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play. Like any local law that conflicts with federal regulatory measures (Public Utilities Com. v. United States, 355 U. S. 534, 2 L. Ed. 2d 470, 78 S. Ct. 446; Service Storage & Transfer Co. v. Virginia, 359 U. S. 171,

> 3 L. Ed. 2d 717, 79 S. Ct. 714), state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow."

In *Northern Pacific Railway Co.* v. *The State of Washington,* 222 U. S. 370, it was held that where Congressional enactment has pre-empted the field, federal law must prevail, whether or not the violation is deemed by the state to be a public welfare offense. This Court wrote at page 378:

> "It is elementary * * * that the right of a state to apply its police power for the purpose of regulating interstate commerce * * * exists only from the silence of Congress on the subject and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation, that subject was at once removed from the sphere of the operation of the authority of the state."

The record is clear that the People failed to prove that the petitioners knowingly intended not to comply with the placarding regulations of Section 380 of the New York Vehicle and Traffic Law. The Court of Appeals, in its opinion, wrote that "it could scarcely be doubted that this record would sustain a conviction under the Federal statute." It is apparent that the New York Court is unfamiliar with the federal decisions holding precisely to the contrary.

In *St. Johnsbury Trucking Company, Inc.* v. *United States,* 220 F. 2d 393, a conviction was reversed by the

Court of Appeals for the First Circuit because of lack of proof that the interstate motor carrier knowingly failed to take the required steps to avoid violating the regulations of the Interstate Commerce Commission. The degree of proof of criminal intent necessary to convict was set forth at page 397, as follows:

> "Similarly here the Government must prove that the defendant, aware of the dangerous nature of these batteries, deliberately chose to transport them without placarding its trucks or labeling its shipping papers or that the defendant willfully neglected to take proper precautions in order to prevent dangerous articles being transported in violation of the applicable Interstate Commerce Commission Regulations."

In the case of *Boyce Motor Lines* v. *United States,* 342 U. S. 337, where the facts were similar to those involved here, this Court wrote, at page 342:

> "The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid."

A conviction of a motor carrier for failure to placard a truck was reversed in *United States* v. *Chicago Express, Inc.,* 235 F. 2d 785, because of the trial court's refusal to charge as follows:

> "'* * * 'before the defendant can be found guilty, the jury must believe from the evidence that defendant had a specific wrongful intent to violate the regulations of the Interstate Commerce Commission.'"

The Court of Appeals for the Seventh Circuit also noted at page 786 that:

> "By using the word 'knowingly' in §835, we think Congress, while describing a state of mind essential for responsibility, removed violations of the relevant regulations from the classification familiarly known as offenses malum prohibitum, public welfare, and civil offenses."

Where an actual conflict exists between federal law and state statute, federal regulation must prevail. Where an act of interstate transportation is involved, the requirements of proof in a state prosecution should not differ from those in a federal prosecution. The petitioners are entitled to the equal protection of law and should not be discriminated against with regard to the vital element of proof of criminal intent.

At the trial of this case in the Criminal Court of the City of New York, the defendants asserted their claim that Section 380 of the Vehicle and Traffic Law was unconstitutional (RA, pages 30-31). When the trial court rendered its decision, the question as to the constitutionality of the statute was again raised (RA, page 40).

Along with this issue the defendants asserted that neither a prima facie case was made out against them nor was their guilt proved beyond a reasonable doubt. These contentions were based on the inability of the prosecution to prove the actual contents of the drums being transported, and the failure to make the statutory test to determine flammability on any samples taken from the drums (RA pages 31, 39, 40). On all of these occasions, including the matter of the constitutionality of the statute, the issues were decided against the petitioners, and exceptions were duly taken to the court's rulings. The federal questions were thus timely and properly raised

in the trial court and in the appellate courts, so as to give this Court jurisdiction to review on writ of certiorari if it so exercises its discretion.

The federal case of *United States* v. *A & P Trucking Corp., et al.*, 113 F. Supp. 549, was cited to show that the use of the Tagliabue open-cup test, as provided for in the statute and the regulations, was an absolute prerequisite for a finding that a violation had been committed. The court set aside the conviction of the defendant in that case because of the failure of the government to employ the precise testing method called for by the federal regulation, and said, at page 551:

> "The plain meaning of the regulation applies the criminal sanction to persons unlawfully transporting such articles as are flammable according to a prescribed test and standard: 'determined by flash point from Tagliabue's open-cup tester.' The government may not disregard this definitive provision. It is the essential test to convict under the applicable regulations."

In the case here under review, no test of any kind was performed. A conviction under such circumstances constitutes a deprivation of the rights of the petitioners without due process of law.

The serious questions presented by this case are of great and recurring significance. The important nature of the issues here presented as they relate to federal-state relationships, the effect of the decision below, if unreversed, on interstate commerce and transportation, and the question as to whether the petitioners have been denied due process and deprived of equal protection of the law, make this case an appropriate one for the exercise of the Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM BREITBART
Counsel for Petitioners
Office & P.O. Address
No. 1 Liberty Street
New York, N. Y. 10005

[APPENDIX FOLLOWS]

APPENDIX A

Judgments of the Criminal Court of the City of New York

PEOPLE OF THE STATE OF NEW YORK
on complaint of Officer John Gillies

—against—

TRANSAMERICAN FREIGHT LINES, INC.,

Defendant.

Docket No. 5-12615

Charge: Sec. 380, Subd. 3, Veh. & Traffic Law

Guilty after trial.

Sentence: $500.

ARTHUR BRAUN
October 20, 1967

Fine paid.

Date: October 20, 1967.

Amount: $500.

Appendix A

PEOPLE OF THE STATE OF NEW YORK
on complaint of Ptl. John Gillies

—against—

RALPH CARBONE,

Defendant.

Docket No. 5-12616

Charge: Sec. 380, Subd. 3, Art. 9, Ver. & Traffic Law

Guilty after trial.

Sentence: $50.

ARTHUR BRAUN
October 20, 1967

Fine paid.

Date: October 20, 1967.

Amount: $50.

Appendix A

Opinion of the Criminal Court of the City of New York

ARTHUR BRAUN, J. The corporate and individual defendants, Trans-American Freight Lines, Inc., and Ralph Carbone, are charged with the violation of subdivision 3 of section 380 of the Vehicle and Traffic Law to wit: "3. It shall be unlawful to transport by motor vehicle over the highways within this state any dangerous article without conspicuously marking or placarding any motor vehicle engaged in such transportation on each side and on the rear thereof with the word 'dangerous' or the common or generic name of the substance transported or its principal hazard; provided, that the commissioner of motor vehicles may, by regulation issued after a public hearing, prescribe with respect to any specific dangerous article the minimum quantities below which no placard shall be required."

15 NYCRR 67.6(a)(1) provides that the motor vehicle need not be marked or placarded if it contains less than 2,500 pounds of dangerous articles as set forth in subdivision 3 of section 380. The defendants are charged with transporting 15 drums of ethylene oxide weighing 10,038 pounds.

The vehicle involved herein was a tractor and trailer operated by the individual defendant and bore on it the name of the corporate defendant. It was stopped at the entrance to the Holland Tunnel on the New York side after the toll was paid, by an officer of the Port of New York Authority assigned to check trucks for dangerous commodities at that site.

The evidence consisted of a bill of lading containing the name of the corporate defendant as well as the name of the shipper, a Kentucky company, and that of the consignee in New Jersey. It stated that 15 drums of eth-

ylene oxide weighing 10,038 pounds were being transported. Also introduced were a facsimile of the red labels required for flammable liquids by the I. C. C., and a tag removed from one of the drums stating in part "Ethylene Oxide * * * active ingredients 99%+ * * * Danger: Extremely flammable. Breathing of vapor harmful" etc., a photograph purporting to show several of the drums in the trailer, and three photographs showing the corporate defendant's name on three sides of the trailer.

Testimony by the chief of chemical testing for the Port Authority, Norman Liebsman, was to the effect that ethylene oxide was a flammable liquid within the statutory prohibition as set forth in section 380 "which gives off flammable vapors (as determined by flash point from Tagliabue's open cup tester * * *) at or below a temperature of eighty degrees fahrenheit."

The testimony indicated that neither a marking nor placarding appeared on each side and the rear of the motor vehicle with the word "dangerous", nor was the name of the substance transported or its principal hazard marked thereon as required by the statute.

The defendants rested after the motion on the prima facie case was denied. The defendants put at issue, in the main, the following points:

(1) That proof of criminal intent is required for a conviction under subdivision 3 of section 380.

(2) That if subdivision 3 of section 380 is interpreted as not to require a criminal intent it should be held unconstitutional as an inconsistent invasion of a sphere preempted by the Federal Government in which a similar regulation (U. S. Code, tit. 18, §834, subd. [f]) states in part: "Whoever knowingly violates any such regulation shall be fined", etc.

(3) That there was no evidence that the Tagliabue's open cup tester was used to determine the flash point as set forth in the statute.

In *People* v. *Hartford Transp. Co.* (6 Misc. 2d 562 [1957]) Judge Malbin in describing the legislative history of the statute found (p. 565) that the "legislation was enacted as a direct result of the Holland Tunnel fire in 1949, the express purpose being to prevent the hazard that arises from the undisclosed presence on public highways of dangerous articles." In commenting on *St. Johnsbury Trucking Co.* v. *United States* (220 F. 2d 393), relied on by the defendants herein, Judge Malbin quoted from the concurring opinion wherein the intent to violate or willfully fail to take reasonable steps to avoid violation was considered essential for conviction under the I. C. C. regulations. It was pointed out however, at page 398, "If it be thought that the indicated requirement of proof [criminal intent] will seriously hamper effective enforcement of the Interstate Commerce Commission regulations, the answer is that Congress is at liberty to fix that up by striking out * * * *mens rea*—'knowingly'—as applied to violation of regulations of the sort here involved. That is to say that Congress could convert the offense into * * * a 'public welfare offense', requiring no element of guilty knowledge or other specific *mens rea*".

Section 380 of the New York State law seemed to follow that recommendation by eliminating the prescribed element of *mens rea* and created thereby a "public welfare offense".

It is argued by the defendants that despite the elimination of the word "knowingly" in the New York statute it was intended by the Legislature to enact legislation substantially identical with the Federal provisions. The de-

fendants furnished a copy of a letter sent to Governor Dewey recommending the enactment of the new regulation "generally identical with the Interstate Commerce Commission regulations". The fact that the elimination of the matter of intent was not alluded to in that correspondence cannot be conclusive as to the intent of the Legislature. Certainly much more cogent proof of such intent would be necessary. The fact is that section 380 was "generally identical" to the I. C. C. regulations.

We come now to the question of whether or not subdivision 3 of section 380 is unconstitutional because it is inconsistent or contrary to the Federal regulations and thereby an invasion of a sphere pre-empted by the Federal Government. We see no conflict between State and Federal regulations. The regulations are practically identical in substance. In fact subdivision 4 of section 380 of the Vehicle and Traffic Law states in part that "nothing in this section contained shall apply to * * * transportation of any dangerous article by highway when packed, marked, labeled or accompanied by shipping papers in conformity with the applicable regulations of the Interstate Commerce Commission and placarded in conformity with the provisions of subdivision three of this section".

Section 77.823 of title 49 of the Code of Federal Regulations also provided that a motor vehicle transporting 2,500 or more pounds of flammable liquids shall be suitably marked or placarded on each side and rear.

Had there been compliance with the I. C. C. regulation there could be no violation of the State regulation.

Exclusive occupation of a sphere of regulation is not to be implied unless the act of Congress is in actual conflict with law of the State. (*Huron Cement Co.* v. *Detroit*, 362 U. S. 440, 443.)

Appendix A

In *Huron* it was stated by the court: "in determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." (p. 443).

In *California* v. *Zook* (336 U. S. 725 [1949] the defendants contended that in part that State's laws "'aiding' enforcement are invalid" (p. 729).

The court stated that: "if the claim is conflict in terms, it 'must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulations.'" (p. 733). The court concluded by stating: "the State may punish as it has in the present case for the safety and welfare of its inhabitants; the nation may punish for the safety and welfare of interstate commerce. There is no conflict." (p. 738).

Where violation of the statute (Vehicle and Traffic Law, §380, subd. 3) was charged and a prima facie case made and the defendants then rested without affirmatively challenging the evidence adduced at the trial, it is reasonable to assume that the 15 drums being transported contained ethylene oxide as clearly marked by a tag attached to each drum and in addition that each drum had affixed to it I. C. C. red labels specified for flammable liquids. The copy of the bill of lading and the markings on the trailer clearly implicated this corporate defendant as well as attesting to the presence of ethylene oxide. The fact that, although given the opportunity, the defendants came forwarded with no proof of any kind to challenge the evidence offered by the People it became

unnecessary that the Tagliabue test be made of the contents of the articles transported. The chemist testified however, that ethylene oxide came within the definition of flammable articles prohibited for transportation by the statute in weights in excess of 2,500 pounds.

As to whether or not these defendants were guilty beyond a reasonable doubt despite the lack of an actual test of the flammable articles, I believe is best illustrated by the recent (1960) case of *People* v. *Leonard* (8 N Y 2d 60). Although it involved an alcoholic beverage sale to a minor the question of direct proof of the contents of the drink sold was an issue.

At page 62 the court stated: "The courts have noted as a matter of common knowledge that drinks of certain names and descriptions are alcoholic beverages within the meaning of regulatory statutes (*McDonnell* v. *United States,* 19 F. 2d 801, 804, cert. denied 275 U. S. 551 * * *). * * * The same test is to be applied as in any criminal case, i.e., whether the evidence 'points logically to defendant's guilt and excludes, to a moral certainty, every other reasonable hypothesis' (*People* v. *Harris,* 306 N. Y. 345, 351 * * *). There is no well-considered authority to sustain the determination of the court below to the effect that the crime charged may be proven only by direct evidence as to the nature of the beverage sold. * * * Nevertheless, since intent is not a necessary ingredient of this crime, he is responsible for the act of his employees (*People* v. *Hawk,* 156 Misc. 870, aff'd. 268 N. Y. 678 * * *)."

I find both defendants guilty beyond a reasonable doubt.

July 7, 1967

Appendix A

Order and Judgment of the Supreme Court Appellate Term, First Department

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 19th day of June, 1968.

Present:

HON. SAMUEL H. HOFSTADTER, J.P.
HON. SAMUEL M. GOLD,
HON. JACOB MARKOWITZ,

Justices.

THE PEOPLE OF THE STATE OF NEW YORK
on Complaint of Officer John Gillies,

Respondent,

—against—

TRANS-AMERICAN FREIGHT LINES, INC. and
RALPH CARBONE,

Defendants-Appellants.

An appeal having been taken to this court by defendants from judgments of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. Arthur Braun, on the 7th day of July, 1967, upon the charge of transporting a flammable liquid (Vehicle and Traffic Law, §380, subd. 3), and having been sentenced by Hon. Arthur Braun on the 20th day of October, 1967, as follows:

Appendix A

Trans-American Freight Lines, Inc.—$500 fine
Ralph Carbone—$50 fine

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same are hereby affirmed.

Enter

S. H. H.
Justice Appellate Term,
Supreme Court, First Department.

Filed, June 20, 1968,
County Clerk's Office, New York

Appendix A

Per Curiam Opinion of the Supreme Court, Appellate Term, First Department

Appeal by defendants from judgments of conviction of the Criminal Court of the City of New York, County of New York, rendered October 20, 1967, convicting them of violating Vehicle and Traffic Law section 380, subdivision 3 (transporting a flammable liquid), after trial (Braun, J.) and sentencing the corporate defendant to a fine of $500 and the individual defendant to a fine of $50 (Braun, J.). The fines were paid.

Abraham Breitbart, New York City, for defendants-appellants.

Lewis Rosenberg and Alan J. Littau, New York City, for respondent.

Before HOFSTADTER, J.P., and GOLD and MARKOWITZ, JJ.

PER CURIAM:

Judgments of conviction affirmed.

All concur.

June 19, 1968.

Appendix A

Order and Judgment of The Court of Appeals of the State of New York

No. 114

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of June in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur—June 4, 1969.
App. T. 1. No. 114 69

The People & c.,

Respondent,

vs.

Transamerican Freight Lines, Inc., & ano.,

Appellants.

Be it Remembered, That on the 7th day of March in the year of our Lord one thousand nine hundred and sixty-nine, Transamerican Freight Lines, Inc., & ano., the appellants in this cause, came here unto the Court of Appeals by Tell, Cheser, Werner & Breitbart, their attorneys, and filed in the said Court a Notice of Appeal and

return thereto from the judgment of the Appellate Term of the Supreme Court in and for the First Judicial Department. And The People & c., the respondent in said cause, afterwards appeared in said Court of Appeals by Lewis Rosenberg, Attorney, Port of New York Authority.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Abraham Breitbart, of counsel for the appellants, and by Mr. Lewis Rosenberg, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York

Court of Appeals, Clerk's Office
Albany, June 4, 1969

Appendix A

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(SEAL)

Appendix A

Opinion of the Court of Appeals of the State of New York

BERGAN, J.:

Defendant Transamerican Freight Lines' truck, driven by defendant Carbone, was stopped by a Port Authority police officer September 8, 1966 as it was about to enter the Holland Tunnel. On examining the shipping documents, it was found the bill of lading specified that in the cargo were 15 drums of ethylene oxide weighing 10,038 pounds.

In this prosecution under a New York statute (Vehicle and Traffic Law, §380) for failure to mark a warning on the outside of a truck carrying a "dangerous article", two problems arise: (a) whether a case has been made out under the statute; (b) whether the statute occupies a field pre-empted by Federal law.

The statute (§ 380, subd. 1) defines a dangerous article, among other things, as including a flammable liquid, i.e., one which "gives off flammable vapors (as determined by flash point from Tagliabue's open cup tester, as used for test of burning oils) at or below a temperature of eighty degrees Fahrenheit".

It further provides (subd. 3) that it "shall be unlawful" to transport "any dangerous article without conspicuously marking or placarding any motor vehicle engaged in such transportation on each side and on the rear thereof with the word 'dangerous' or the common or generic name of the substance transported or its principal hazard".

The officer looked at the cargo and saw fifteen 50-gallon drums. There were red labels on the drums of a type prescribed by Interstate Commerce regulations for liquids. One stated "Caution" and gave certain directions in respect of safety. There were also tags on the drums stat-

ing "Ethylene Oxide, 99% pure". One of the tags had a long list of precautions and, among other things, said: "Danger: Extremely flammable".

No chemical test was made of the actual contents of the drums. The People proved that no warning or other notice of the contents of the truck's cargo appeared on the outside of the truck. No proof was offered by the defendants.

A case prima facie has been made out establishing this truck was carrying over 10,000 pounds of ethylene oxide. The bill of lading said this. A physical inspection of the outside of the drums showed this substance was noted as being in the drums. Tags attached confirmed this; the warning labels required by ICC regulations added to the confirmation.

A chemist for the Port Authority, qualified as an expert, testified that ethylene oxide has a flash point of minus four degrees Fahrenheit. This is greatly below (i.e., 84 degrees below) the minimum flash point prescribed in the statute (§ 380, subd. 1).

The direct proof is that the truck was not marked as required by law and the circumstantial evidence sustains a case prima facie that the cargo consisted of a dangerous article of the prescribed weight. (See *People* v. *Wachowicz,* 22 N Y 2d 369, and its counterpart, *People* v. *Cleague,* 22 N Y 2d 363; *People* v. *Leonard,* 8 N Y 2d 60.) The record meets all the classic requirements for a sufficient circumstantial case in *People* v. *Harris* (306 N. Y. 345, 351).

Appellants argue also that Congress has so occupied the field of regulation of interstate shipment of dangerous material that subdivision 3 of section 380 of the Vehicle and Traffic Law is invalid as in conflict with Federal

laws. A comparison of the Federal and the State laws in relation to safety shows that they are quite harmonious and have the same objectives. The specifics are left to the Regulations of the Interstate Commerce Commission (USCA, title 18, sec. 834).

The regulations are almost literal copies of the New York statute (Code of Federal Regulations, title 49, §§ 73.115, 77.823). In dealing with prosecutions the Federal statute (§ 834[f]), proscribes knowing violations. The State statute does not require the violation to be "knowing" and provides for penalties as *malum prohibitum*.

This is not the kind of a conflict between Federal and State legislative policy in the same area which invalidates a State statute. It could scarcely be doubted that this record would sustain a conviction under the Federal statute. That these defendants, with this kind of a bill of lading and a cargo specifically marked as being dangerous and inflammable, could be thought to have carried the ethylene oxide without knowing it, is a remote possibility. In this kind of a situation "knowingly" plays no practical role.

Cases such as *Castle* v. *Hayes Frgt. Lines* (348 U. S. 61), on which appellants heavily rely, turn upon real and not theoretical intrusion of a state on federally regulated interstate commerce. The suspension of the operating rights of interstate carriers on State roads for repeated violations of weight regulations was the issue there. These suspensions were regarded by the court as the disruption of a federally authorized activity.

But certain powers of regulation remain to the State in providing for safety on its highways consistent with Federal interstate regulations (*Maurer* v. *Hamilton*, 309 U. S. 598; *cf. South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177).

Appendix A

When state and Federal regulatory statutes have the same purpose and are harmonious, as the statutes regulating dangerous substance in transit certainly are, the state is not ousted of jurisdiction because the United States has also acted (*California* v. *Zook,* 336 U. S. 725).

State and Federal regulations in such a situation as this one may be deemed to "have their separate spheres of operation" (*Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 208). In 1962 the court cited the principle of *Zook* with approval in another context (*Colorado Comm.* v. *Continental Air Lines,* 372 U. S. 714, 722).

The judgment should be affirmed.

Chief Judge Fuld and Judges Burke, Scileppi, Breitel and Jasen concur.

Judgment affirmed.

June 4, 1969.